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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 36

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

WALTER C. JANNEY AND PAULINE F. M. JANNEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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Counsel for Respondents

Of Counsel:
HARRY J. RUDICK

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BRIEF FOR THE RESPONDENTS.

Statements of Opinion Below, Jurisdiction, Question Presented, Statute and Regulations Involved, and the Facts.

The statements on these points on pages 1 to 4 and pages 34 to 37 of the Petitioner's brief are accepted by the Respondents.

Summary Statement of Respondents' Argument.

1. Section 117(d) of the Revenue Act of 1934 was not intended to change the long-established rule that, in a joint return of husband and wife, the net capital loss of one

spouse is to be offset against the net capital gain of the other in computing the amount of their joint taxable gain, if any.

2. The arguments of the Petitioner in support of the opposite view are unsound.

Respondents' Argument.

1. Section 117(d) of the Revenue Act of 1934 was not intended to change the long-established rule that, in a joint return of husband and wife, the net capital loss of one spouse is to be offset against the net capital gain of the other in computing the amount of their joint taxable gain, if any.

Section 51(b) of the Revenue Act of 1934 (and the cognate sections of earlier acts as far back as the Revenue Act of 1918) provides that:

> "If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—
>
> (1) Each shall make such a return, or
>
> (2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

There is nothing in Section 51 which, in express terms, provides for the deduction of the expenses or losses of either spouse if they elect to file a joint return.[1] But for the cogent reasons set forth as early as 1921 in *Solicitor's Opinion 90,* 4 Cum. Bull. page 236,[2] the Treasury Depart-

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[1] The entire Section is given in the Appendix to this brief.

[2] The full text of this Opinion is given in the Appendix to this brief.

ment has consistently held that "the aggregate income" means the aggregate *net* income and that, in filing a joint return, one spouse is entitled to offset his expenses, interest, taxes and losses against the income of the other. And from the time that capital gains and losses were accorded special treatment for purposes of the income tax (the Revenue Act of 1921), the Bureau of Internal Revenue permitted one spouse to offset his or her capital losses against the capital gains of the other, in computing the amount of net capital gain to be reported in a joint return. If there was any excess of capital losses over capital gains, the excess was in effect allowed as a partial offset against the joint income from other sources.

But in administering the Revenue Act of 1934 the Commissioner of Internal Revenue ruled (and here seeks to have this ruling sustained) that in computing the net capital gain to be included in a joint return, the capital gain of one spouse is to be reduced, not by the entire capital loss of the other, but by a maximum of $2,000. He maintains that this ruling is required or supported by subsection (d) of Section 117—the "Capital Gains and Losses" section—of the Revenue Act of 1934, reading as follows:

> "(d) Limitation on Capital Losses—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges."

The Respondents submit that this provision has no relevant bearing whatsoever on the question of whether or not Congress intended to continue to permit the entire amount of the capital losses of one spouse to be offset against the capital gains of the other in determining the amount of net capital gain, if any, to be reported for tax. They maintain that Section 117(d) comes into play, by its very terms,

only when the question of how much deductible net capital *loss* is to be allowed; the question that would be raised if Mr. and Mrs. Janney, instead of having a joint net *gain* of $2,527.65, had had a joint net *loss* of that amount. Then, and then alone, under the Respondents' view, Section 51(d) would come into play and limit the deductible loss—the loss deductible from ordinary income—to $2,000.

This view is squarely sustained by the reports of the Committee on Ways and Means of the House and the Committee on Finance of the Senate on the Revenue Bill of 1934, giving the reason for the proposed restriction on the deduction for capital losses previously allowed. The House Committee said:

> "Your committee has examined the British system, which disregards these" (capital) "gains and losses for income-tax purposes. The stability of the British revenue over the last 11 years is in marked contrast to the instability of our own. In that period the maximum British revenue was only 35 per cent above the minimum, while in our own case the percentage of variation was 280 per cent.
>
> * * * * *
>
> "* * * The method proposed is safe from a revenue standpoint, inasmuch as capital losses can not be used to reduce ordinary income, while gains are taxed in full or in part in proportion to the time for which the property has been held * * *" (H. Rept. No. 704 (73d Cong., 2d Sess.), p. 10 (Feb. 12, 1934)).

It will be observed that the Committee said nothing whatever about forbidding a husband and wife, who file a joint return, from offsetting the capital gains of the one by the capital losses of the other. Moreover, the plain inference of what the Committee did say is that it intended no such limitation, because allowing one spouse to offset capital losses solely against the capital gains of the other

does *not* permit the spouses to use capital losses to "reduce ordinary income"—the feature of the existing system which it was proposed to eliminate.

The Senate had the same intention as the House, as appears from the following statement in the Senate Committee report:

> "Your committee concurs in the general features of the plan proposed by the House Bill, but believes a few modifications should be made therein.
>
> * * * * *
>
> "Third, in the case of the general limitation provided in the House bill that capital losses should only be allowed to the extent of the capital gains, your committee recommends that $2,000 of such excess of losses may be charged off from ordinary income * * *" (Sen. Rept. No. 558 (73d Cong., 2d Sess.), p. 12 (Mar. 28, 1934)).

The Respondents submit that Section 117(d), embodying the House proposal as slightly amended to conform to the Senate recommendation, gives no support whatsoever to the Petitioner's position that Congress intended in the 1934 Act to change the previously well-established rule that a husband and wife, filing a joint return, could reduce the capital gains of one by the capital losses of the other, in determining the amount of net capital gain, if any, subject to tax.

2. The arguments of the Petitioner in support of the opposite view are unsound.

(a) The Van Vleck and Related Cases.

The Petitioner's principal argument is not that the decision below is intrinsically unsound, but that it is in conflict with other decisions and the Treasury Regulations.

The first group of allegedly conflicting decisions is that beginning with *Van Vleck* v. *Commissioner*, 80 F. (2d) 217 (C. C. A. 2d, 1935), cert. den. 298 U. S. 656.

The facts in the *Van Vleck* case were as follows: In 1930 Mrs. Van Vleck had a large income. Her husband had sustained business losses far in excess of all his income from other sources in 1929 and again in 1930. Mr. and Mrs. Van Vleck filed a joint return in 1930, in which the wife claimed as a deduction from her income, not only her husband's losses for 1930, but also his losses for 1929. She based her claim to this latter deduction on Section 117(b) of the Revenue Act of 1928, which provided that:

> "If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year * * *."

Under the long-established rulings and practice of the Treasury Department, the Commissioner of Internal Revenue held that the deduction of the husband's 1930 losses was correct, but he ruled that the deduction of the husband's *1929* losses was not permissible. His ruling was based on the following language of Section 117(b):

> "If, * * * any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year * * *."

coupled with the following language of Section 117(a)(6):

> "In computing a net loss for any taxable year a net loss for a prior year shall not be allowed as a deduction."

The Commissioner argued that a husband and wife, even though they filed joint returns, remained separate taxpayers; that Section 117(b) permitted the carryover loss deduction (an extraordinary allowance at best) only to "the taxpayer" who had sustained the loss; that in the instant case "the taxpayer"—the husband—already had a net loss for 1930, without counting in his 1929 loss; and that Section 117(a)(6) explicitly declared that:

> "In computing the net loss for any taxable year a net loss for a prior year shall not be allowed as a deduction."

The Circuit Court of Appeals for the Second Circuit sustained the Commissioner's position, saying (p. 218):

> "* * * the right to carry over is expressly limited to 'any taxpayer [who] has sustained a net loss,' and the right to use the deduction is as expressly limited to 'computing the net income of the taxpayer' for the succeeding year or years. It follows that the only taxpayer who could use the husband's 1929 net loss in computing net income for 1930 was the taxpayer who sustained the loss, i. e., the husband himself. But it so happens that his right to take it into the computation is so restricted" (by Section 117(a)(6)) "that he could not even do this * * *."

In the *Pierce, Demuth, Sweet* and *Nelson* cases, relied on by the Petitioner (pp. 10 to 12 of Petitioner's brief), the Courts sustained the Commissioner's position that in a joint return spouses could not offset the non-capital stock losses of one against the non-capital stock gains of the other, because of the provision in Section 23(r)(1) of the Revenue Act of 1932, that:

> "Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section)

which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by the taxpayer from the retirement of his own obligations)."

The first case to arise under this Section—the *Pierce* case—came before the Second Circuit which had decided the *Van Vleck* case. The Commissioner argued and the Court held that the decision in that case was decisive of the *Pierce case.* Judge Learned Hand wrote a strong dissent. The later cases, involving this same Section—Section 23(r)(1)—followed, without much reasoning, the majority decision in the *Pierce* case.[3]

The case of *Taft* v. *Helvering,* 111 F. (2d) 145 (C. C. A. 2d, 1940), arising under the 1934 Act, holds that the charitable contributions of one spouse cannot be deducted from the income of the other, even though the aggregate contributions of the two are less than 15 per cent of the net income reported in the joint return. This decision was

[3] The per curiam opinion in *Nelson* v. *Commissioner,* 104 F. (2d) 521 (C. C. A. 4th, 1939) states:

> "While a majority of this Court are much impressed with the reasoning of Judge Learned Hand in his dissenting opinion in the *Pierce* case, the legal question involved is a close one, and we feel that we should follow the decisions of the First and Second Circuits, particularly in view of the denials of certiorari by the Supreme Court. We are told that no inference should be drawn from the denial of certiorari, but it is hard to imagine that certiorari would have been denied in a case of this character unless the Court was satisfied of the correctness of the decision below, particularly if its correctness had been challenged by a dissenting opinion."

The inference of this language is that the Court of Appeals in the *Nelson* case was swayed by the denial of certiorari in the *Pierce* and *Sweet* cases. If so, the Court must have overlooked the following statement of Mr. Justice Holmes in *U. S.* v. *Carver,* 260 U. S. 482, 490 and *Atlantic Coast Line R. R. Co.* v. *Powe,* 283 U. S. 401, 403-4:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

based on the following provision of Section 23 of the Revenue Act of 1934:

> "In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (o) Charitable and Other Contributions. In the case of an individual, contributions or gifts made within the taxable year to or for the use of" (naming various public or charitable uses) "to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection * * *."

In this case the Court simply followed the earlier decisions in the same (Second Circuit) Court, without setting forth any reasoning in support of its decision.

The decision in the *Van Vieck* case was probably sound. The permission to carry over losses from one year to the next was a most exceptional one, and there was reason for the Courts to believe that Congress intended that the allowance be narrowly circumscribed by emphasizing the significance of the term "taxpayer". But there is no reason to believe that Congress intended that a similar emphasis be given to the word as used in Section 23(r)(1) of the 1932 Act or Section 23(o) of the 1934 Act. The latter is particularly questionable, because the members of Congress must have been aware that it is common practice for the wife to make out of her allowance most of the charitable contributions for both members of the family, and it is difficult to believe therefore that Congress intended that, in a joint return, the deduction for charitable contributions should be limited to 15 per cent of the income—frequently little or nothing—of the wife alone. To give the word "taxpayer" the same significance through-

out the Revenue Acts as in the loss carry-over provision leads to almost absurd results.

But even if "taxpayer" must be given the same restrictive significance whenever and wherever it appears in one of the Revenue Acts, such a view would not sustain the Government's position in the present case, because Congress did not use the word "taxpayer" in Section 117(d) of the Revenue Act of 1934. The Commissioner has in effect read into this Section the following words in brackets:

> "Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains" [of the taxpayer] "from such sales or exchanges."

But Congress itself did not employ the words "of the taxpayer", and there is no reason to believe that Congress intended that a husband and wife, filing a joint return, should be subjected to the limitation which might possibly be implied if these words had been used.

(b) The Thomas and Related Cases.

Petitioner also relies (p. 19 of his brief) on the decision, and the alleged logical consequence of the decision, in *Commissioner* v. *Thomas,* 84 F. (2d) 562 (C. C. A. 5th, 1936), the facts of which are as follows: In 1930, Thomas sold some stock to his wife at a loss. His wife and he filed a joint return, in which this loss was claimed as a deduction. The Commissioner disallowed this loss. But the Court held that the filing of the joint return did not destroy the separate identities of the two spouses and that the loss should be allowed, saying (p. 563):

> "* * * Section 51 *supra,*" (the joint returns section of the 1928 Act) "is clearly intended by Congress

to be in favor of the taxpayer. Therefore, it should be liberally construed to effectuate that intention * * *."

Several other similar cases, cited in Petitioner's brief (p. 19), have been similarly decided. The Petitioner maintains that the necessary consequence of these decisions is that Congress must be held to have intended that, under the 1934 Act, the capital losses of one spouse cannot be offset against the capital gains of the other.

Respondents believe that the decisions in the *Thomas* and related cases reach a result which Congress did not intend and are of doubtful validity in the light of the recent decision of this Court in *Higgins* v. *Smith*, 308 U. S. 473, holding that the sale at a loss of property by a stockholder to a corporation which he controls results in no deductible loss. But even if the decisions in the *Thomas* and related cases must stand, it does not follow that the decision of the Court below in this case should fall. This Court recently held in the case of *United States* v. *Pleasants*, 305 U. S. 357, that theoretical consistency need not be adhered to at all costs in the construction of taxing Acts. In that case this Court held that, even though net capital *gains* are included in computing the income base to which the 15 per cent limitation on charitable contributions applies, taxpayers are not required to include net capital *losses* in computing this basic figure. This Court said (pp. 362-3):

> "There is nothing to the contrary in our decision in *Helvering* v. *Bliss*, *supra*. In that case there was a capital net gain. The net income of the taxpayer comprehended that net gain as well as his net income otherwise computed. We decided that it was his total net income which was to be regarded as the basis for the allowance under § 23(n). We found nothing in

§ 101, which in that application prescribed 'mer
a method for segregating a portion of that
income for taxation at a special rate,' that in
wise altered the right of the taxpayer to take
deduction in accordance with § 23(n). *Id.*, 150, 1
Here, instead of a capital net gain, we have a cap
net loss. There is no gain to be added to the t
payer's net income otherwise computed and thus t
is the only net income taxable under the statute.
that net income, the provision of § 23(n) appropria
applies. We observed in the *Bliss* case that the
emption of income devoted to charity and the red
tion of the rate of tax on capital gains 'were liberal
tions of the law in the taxpayer's favor, were begot
from motives of public policy, and are not to be n
rowly construed.' That observation is equally pe
nent here."

(c) The Cole and Related Cases.

Petitioner also relies (p. 20) on the decisions in *C*
v. *Commissioner*, 81 F. (2d) 485 (C. C. A. 9th, 1935) (Ju
DENMAN dissenting), and similar cases. In these cases
Court held that the liability of spouses filing a joint
turn was not joint but several, and that the liability
each must be determined by the Commissioner by wo
ing out, through an analysis of the items of income
deductions of each spouse (sometimes a most complex pr
lem), the proportionate *net* income contributed by each
the joint return.

Respondents submit that these decisions are unsou
They believe that the sound view was stated by Ju
PATTERSON of the Second Circuit Court of Appeals in
dissenting opinion in *Commissioner* v. *Rabenold*, 108
(2d) 639 (C. C. A. 2d, 1940), not cited by the Petitio
on this point. In that case, involving precisely the sa
question as that in the *Cole* case, Judge PATTERSON s
(p. 641):

"I dissent. The respondents, husband and wife, saw fit to file a single joint income tax return for 1933. The Revenue Act of 1932, like prior acts, gave them the right to file 'a single joint return' and declared that in such case 'the tax shall be computed on the aggregate income.' The obvious result, it seems to me, is that husband and wife who file a single return are to be treated as a single taxpayer and are jointly liable for the tax * * *."

The *Rabenold* case is also interesting as showing that as late as January, 1940, the Petitioner, in a case somewhat similar to the present, was arguing squarely contrary to the position which he seeks to maintain in the present case.

(d) **The Treasury Regulations Issued in 1935 Are Not Decisive, at Least as to Years Prior to 1936.**

Petitioner maintains that Article 117-5 of Treasury Regulations 86, issued under the 1934 Act, is in accord with his position in the present case, and that this Article is decisive because it has "received tacit Congressional approval through the enactment of identical statutory provisions in the Revenue Act of 1936 and of analogous provisions in the Revenue Acts of 1938 and 1939." (Petitioner's brief, p. 7.)

A somewhat similar line of argument was advanced by the Petitioner and rejected by this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939), involving the question whether or not a corporation was subject to tax on profits derived from the purchase and sale of its own stock in 1929. At the time the sales were made, and long prior thereto, the Regulations provided that dealings by a corporation in its own stock were to be disregarded for income tax purposes. In 1934, the Treasury

Department reversed its position and ruled that such dealings give rise to profit or loss for income tax purposes. The 1936 and 1938 Acts, passed after this new ruling, made no change in the language of the 1934 and earlier Acts bearing on the question. The Commissioner argued, in the *Reynolds* case, that this showed that Congress had adopted the new administrative construction, not only with respect to the years covered by the 1936 and 1938 Acts, but with respect to earlier years as well. This Court rejected the Commissioner's contention, saying (p. 117):

> "It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the regulation in its amended form. But we have no occasion to decide this question since we are of opinion that the reënactment of the section, without more, does not amount to sanction of retroactive enforcement of the amendment, in the teeth of the former regulation which received Congressional approval, by the passage of successive Revenue Acts including that of 1928."

In the present case, the Commissioner first gave notice of his position that the capital losses of a wife could not be offset against the capital gains of a husband, in computing the amount of net capital gain to be reported in a joint return, in Article 117-5 of Treasury Regulations 86, published March 2, 1935.[4] The reasoning of this Court in the *Reynolds* case indicates that the Revenue Acts of 1936 and 1938 should perhaps be construed in conformity with Article 117-5 of Regulations 94, but that the Revenue Act

[4] 1935 C. C. H. Federal Tax Service, Vol. 3, par. 5188. The Regulations were dated September 6, 1934, but were not *published* (*i. e.*, made public) until the date stated. The cover of the printed Regulations contains the imprint "United States Government Printing Office, Washington: 1935."

of 1934—the Act which covers the year here involved—should not be.

Petitioner also seeks to support his position by asserting (p. 7 of his brief) that:

> "* * * Ever since 1921 the Treasury has taken the general position that even in a joint return only those deductions can be taken 'to which either spouse is entitled.' Article 401 of Regulations 62 * * *."

But this statement gives a misleading twist to the Regulations by implying, through the use of the word "only", that the sentence quoted from the Regulations was by way of limitation. As clearly appears from the following fuller quotation from Article 401, this was not the fact:

> "* * * If an individual is a married person living with husband or wife, no return need be made unless their aggregate gross income is at least $5,000 or their aggregate net income is at least $2,000; but a separate return must be made by each of them, regardless of the amount of the individual income of each, where their aggregate gross income is $5,000 or over, or their aggregate net income is $2,000 or over, unless they join in a single joint return. Where the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income * * *."

(e) **The Unfairness of Petitioner's Position.**

If the language of Congress plainly supported the Petitioner's contention, the question of fairness would presumably have to be ignored by this Court. But, as brought out under the first heading of this brief, the language of Section 117(d) of the 1934 Act does not do this. The question of fairness is therefore pertinent.

If Congress had intended in the 1934 Act to establish an exception to the general rule permitting spouses to pool income and deductions, it is reasonable to assume that there would have been some discussion of the proposed change in the Committee reports on the new Revenue Bill and that the draftsmen of the new Act would in fairness have used clear-cut language to bring home to the millions of married taxpayers who had grown accustomed to the existing practice, such proposed singular exception to the pre-existing general rule. Yet, as has been shown, there is nothing in the Committee reports which indicates any such intention (the implication, indeed, is, as has been pointed out, squarely to the contrary) and nothing in the Act which expresses such an intention.

Furthermore, the question whether an exception was intended under a similar section, Section 23(r)(1), of the Revenue Act of 1932 (discussed under an earlier heading of this brief) had been submitted to the Commissioner of Internal Revenue and answered by him as follows on December 29, 1932:

> "Reference is made to your letter dated December 6, 1932, relative to the treatment of gains and losses from the sale of securities by a husband and wife for the year 1932 where a joint income tax return is filed by them. In the illustration or example presented the wife has a gain and the husband has a loss from the sale of securities, each being in the amount of $10,000.00. The specific question presented is whether the loss sustained by the husband may be applied to offset the same amount of gain realized by the wife in rendering joint income tax return for the year.
>
> "* * * If it is correctly understood from your letter that the gains and losses in the illustration presented are from transactions falling within the same class within the meaning of the statute such as sales of

securities not held for a period of more than two years the loss sustained by the husband would offset the same amount of gain realized by the wife from such source."

Signed by David Burnet, Commissioner (symbols IT:E:RR:CNW) (reported in 1933 Commerce Clearing House Federal Tax Service, Vol. III, par. 6037).

This ruling of the Commissioner of Internal Revenue showed by its symbols "RR" (standing for the Rules and Regulations Section of the Bureau, which draws up the Treasury Regulations) that it was of an authoritative character. It was published in the Commerce Clearing House Tax Service for 1933, and, being favorable to the taxpayer, was generally regarded as final. The ruling was re-published in the 1934 Commerce Clearing House Federal Tax Service (Vol. I, par. 340J. 10) and was given wide circulation in *Robert H. Montgomery's Federal Tax Handbook for 1934-5,* which, after quoting Commissioner Burnet's letter of December 29, 1932, says (p. 465):

"The above letter was written in connection with section 23(r) of the 1932 law. However, the reasoning employed is likewise applicable to the provisions of Section 117 of the 1934 law and leads to the conclusion that if husband and wife make a joint return, losses of one on the sale of capital assets can be offset against similar gains of the other in the joint return."

The ruling was still in force on May 10, 1934, when the Revenue Act of 1934 was enacted. It remained unchallenged until the publication of Treasury Regulations 86 on March 2, 1935, when, for the first time, notice was in effect given by the Commissioner that this earlier ruling would not be followed.

Thus throughout the years 1933 and 1934 taxpayers were led by the Commissioner's ruling to believe that the securities losses of one spouse could be offset against the securities gains of the other, and naturally acted in reliance on this belief. To hold now that they were not entitled to rely on the ruling would be patently, and (since the Act does not so require) gratuitously, unfair.

Conclusion.

The decision of the Court below is correct and should be affirmed.

Respectfully submitted,

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Of Counsel:
HARRY J. RUDICK.

October, 1940.

APPENDIX.

Revenue Act of 1934, c. 277, 48 Stat. 680:

Section 51. (a) Requirement.—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) Husband and Wife.—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) Persons Under Disability.—If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(d) Fiduciaries.—For returns to be made by fiduciaries, see section 142.

[U. S. C. Title 26, Sec. 51.]

Solicitor's Opinion 90, 4 Cum. Bull. 236 (1921):

Income Tax—Revenue Act of 1918, Sections 210, 211, 216(c) and 223.

Husband and wife living together may, at their option, file separate returns of income or a single joint return.

If husband and wife living together file a single joint return of income, such return is treated as the return of a taxable unit and the income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual.

If a husband or wife has allowable deductions for any taxable year in excess of his or her gross income for such year, such excess may, if the husband and wife are living together and a single joint return of income is filed, be deducted from the net income of the other spouse for the purpose of computing both the normal and surtax.

The question has arisen whether a husband and wife living together may file a joint return of income under the Revenue Act of 1918, and, if so, in what manner the tax due upon such joint return should be computed. The specific question presented is whether in cases in which a husband and wife living together render a joint return for a year during which the husband or wife has allowable deductions under section 214 of the Act in excess of his or her gross income from all sources, such excess may properly be deducted from the net income of the other for the purpose of computing either the normal or surtax imposed by sections 210 and 211 of the statute.

Sections 210 and 211 of the Revenue Act of 1918 provide that the normal and surtax shall be levied, collected, and paid upon the net income of "every individual." Sections 216 and 223 of the Act read, in part, as follows:

Sec. 216. That for the purpose of the normal tax only there shall be allowed the following credits: * * *

(c) In the case of a single person, a personal exemption of $1,000, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $2,000. A husband and wife living together shall receive but one personal exemption of $2,000 against their aggregate net income; and in case they make separate returns, the personal exemption of $2,000 may be taken by either or divided between them.

Sec. 223. That every individual having a net income for the taxable year of $1,000 or over if single, or if married and not living with husband or wife, or of $2,000 or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this title. If a husband and wife living together have an aggregate net income of $2,000 or over, each shall make such a return unless the income of each is included in a single joint return.

It has been suggested that, in view of the specific provision of sections 210 and 211 that the normal and surtax shall be levied upon the net income of every individual, section 223 does not permit a husband and wife living together to file a joint return as a taxable unit, but merely permits the filing of a joint return of separate incomes, or two ordinary returns on one sheet of paper, for convenient reference.

But one provision of a statute, however specific, must not be so construed as to nullify the plain import of another provision, when by any reasonable construction effect can be given to both provisions. When a general statutory provision is followed by a provision that certain specific cases shall be treated in a different manner, an exception must be made to the former to give full effect to the latter.

It is true that there is no provision in the Act which affirmatively permits the filing of joint returns by husband and wife living together, and authority for such returns must be found by inference from sections 216(c) and 223. However, the inference, if clear, must be given effect.

The popular and received import of words furnishes the general rule for the interpretation of public laws. *Maillard* v. *Lawrence,* 16 How. 251, 14 L. Ed. 925.

It is unnecessary to refer to the definitions given by the dictionaries for the word "joint" to reach the conclusion that the "popular and received import" of the language of section 223 is that the single joint return referred to is one return of a taxable unit and not two returns of two taxable units on one sheet of paper.

There is other language in the statute, however, which more clearly requires such construction. Section 216(c) provides that but one personal exemption of $2,000 shall be taken by husband and wife living together "against their aggregate net income." If the single joint return referred to in section 223 is merely two separate returns on one sheet of paper, there is no "aggregate net income" against which the deduction can be taken. And the statute does not provide by whom the exemption shall be taken in such cases, or whether it may be divided. The last clause of section 216(c) which provides that the personal exemption may be taken by either or divided, applies only when separate returns are filed.

If the single joint return which husband and wife living together are permitted to file by section 223 is merely a joint return of separate incomes, or two returns on one sheet of paper, the only explanation that can be offered for the action of Congress in permitting the filing of such returns is that such joint returns permit more convenient reference in the Bureau

of Internal Revenue, a matter of expediency in administering the taxing statute. It is no more expedient from an administrative standpoint, however, to have the separate returns of husband and wife living together attached to each other, than to have the separate returns of other individuals so attached, as, for instance, the returns of partners or of husband and wife not living together.

Had the provision been intended by Congress as one of administrative expediency, the filing of joint returns would not have been made optional with the taxpayer. If Congress did not intend that husband and wife in such case might file returns as a taxable unit, it considered either that the law would or would not be more easily administered if joint returns were filed by husband and wife living together, and accordingly joint or separate returns would have been required. Certainly no option would have been given to the taxpayer in a matter of governmental administrative expediency.

It is by no means unreasonable to suppose that it was the intention of Congress that husband and wife living together should, if to their advantage, be permitted to file a joint return as a taxable unit. Congress may well have considered it advisable that a net loss sustained by one spouse should be deducted in computing the tax of the other. It is true that husband and wife are not treated throughout the Act as a taxable unit, but Congress may have considered such provision inexpedient or of doubtful constitutionality.

From the foregoing it follows that the proper construction of the Revenue Act of 1918 permits a husband and wife living together, at their option, to file separate returns or a single joint return. If a single joint return is filed it is treated as the return of a taxable unit and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual. In cases,

therefore, in which the husband or wife has allowable deductions in excess of his or her gross income, such excess may, if joint return is filed, be deducted from the net income of the other for the purpose of computing both the normal and surtax.

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